No. 02-1506

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IN THE

Supreme Court of the United States

TPI, a/k/a THAI PETROCHEMICAL INDUSTRY PUBLIC COMPANY LIMITED, THAI PETROCHEMICAL LIMITED, THAI PETROCHEMICAL INDUSTRY PCL, TPI OIL (1997) CO., LTD. and TPI OIL CO. LTD.,

Petitioners,

v.

WINTER STORM SHIPPING, LTD.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICUS CURIAE* THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED IN THE PETITION

"The question presented is whether a federal district court sitting in admiralty should properly look to state law to determine whether a defendant has property in the district subject to attachment under Supplemental Admiralty Rule B, which does not define what is meant by 'property', or does Rule B preempt state law such as the prohibitions of Article 4A of the Uniform Commercial Code against restraining an electronic funds transfer at the intermediary bank stage, where Article 4A provides that a defendant has no property at the intermediary bank stage subject to attachment."

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICUS CURIAE* [1] THE NEW YORK CLEARING HOUSE ASSOCIATION L.L.C. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

With the consent of the parties, The New York Clearing House Association L.L.C. (the "Clearing House") submits this brief as *amicus curiae* in support of the Petition of Thai

[1] No counsel for a party authored any portion of this brief, nor did any person or entity other than the *amicus curiae* make any monetary contribution to the preparation or submission of the brief.

Petrochemical Industry Public Company Limited ("TPI") for a Writ of Certiorari ("Petition") for review of the opinion of the United States Court of Appeals for the Second Circuit filed November 6, 2002 (the "Opinion") in this matter.

The Clearing House respectfully submits that the Second Circuit's decision should be reviewed by this Court because it creates a federal property right out of whole cloth, is inconsistent with federal and state statutory law regarding electronic funds transfers ("EFTs") and the sound policies on which that law is based, conflicts with applicable precedent of this Court and another circuit court, and would create significant and unwarranted disruption to international commercial banking practice.

STATEMENT OF INTEREST OF *AMICUS*

The Clearing House is an association of leading commercial banks that provides payment, clearing and settlement services to its member banks and other financial institutions.[2] The Clearing House regularly appears as *amicus curiae* before appellate courts in cases that raise significant legal issues relating to banking and in particular in cases, like this one, that raise important questions concerning rules governing national and international payment systems.

The Clearing House banks have a substantial interest in the question presented in this case. Electronic funds transfers involving international banks are often routed through Clearing House banks because of their leading presence both in the United States and globally, their widespread bank

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[2] The members of the Clearing House are Bank of America, National Association, The Bank of New York, Bank One, National Association, Citibank, N.A., Deutsche Bank Trust Company Americas, Fleet National Bank, HSBC Bank USA, JPMorgan Chase Bank, LaSalle Bank National Association, Wachovia Bank, National Association and Wells Fargo Bank, National Association.

correspondent networks, and the dollar's role as the world's leading currency for international trade. For these reasons, many foreign banks hold accounts with them, and the Clearing House banks often act as the intermediary bank in EFTs. Moreover, the Clearing House, through an affiliate, operates the Clearing House Interbank Payment System ("CHIPS"), a funds-transfer system that serves over 50 U.S. and foreign banks and that each day processes over 250,000 payment orders worth an average of $1.25 trillion. Accordingly, proper administrative and judicial characterization and treatment of EFTs is critical to the Clearing House banks.[3]

STATEMENT OF THE CASE

This is an important case, with significant implications for international payments and trade and for the United States as the world's leading financial nation. The Second Circuit misinterpreted federal law to pre-empt the funds transfer laws—applicable in every state—that (a) decree that an originator such as TPI has no claim against an intermediary bank in a funds transfer (such as BNY in this case) because the intermediary bank never has any property of the originator, and therefore that (b) bar attachment of an EFT at an intermediary bank. The result of the Opinion is that banking customers are no longer assured of completing their EFTs without judicial interference, and the usefulness of such transfers through a U.S. bank has been undermined.[4]

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[3] As the Second Circuit itself earlier recognized in refusing to enforce a Rule B attachment, "the import of the decision only becomes clear upon realizing how common is the relationship between [the parties] in international trade, and how frequent, therefore, the need for a fund transfer through New York." *Reibor Int'l Ltd.* v. *Cargo Carriers (KACZ-CO.) Ltd.*, 759 F.2d 262, 264 (2d Cir. 1985) ("Reibor").

[4] Because banks' commercial customers often are engaged in shipping or receiving goods or equipment over water, the risk of attachments on EFTs is substantial. Indeed, unless the decision below is reversed, it will

Petitioner TPI and respondent Winter Storm Shipping, Ltd. ("Winter Storm") have a commercial dispute over a ship charter that is unrelated to the EFT here in question. Neither petitioner nor respondent has an account or other business relationship with The Bank of New York ("BNY"). Winter Storm nonetheless served four maritime orders of attachment under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims ("Rule B") for $361,621.58 of "TPI's assets" on each of BNY and other New York banks on June 28 and 29, 2001. Thereafter, on July 2, 2001, BNY as intermediary bank in an EFT received a payment order of over $1,000,000 from Bank of Ayudhya ("BA") in Thailand on which TPI was identified as the originator. BA had instructed BNY to pay this amount to Royal Bank of Scotland in London ("RBS") for further credit to an RBS account in connection with an unrelated transaction, but in view of the series of attachment orders BNY credited $361,621.58 to a suspense account and executed a payment order to RBS for the balance. Winter Storm then served another attachment order on BNY. The District Court found, in accordance with the law of New York, that the amount of a funds transfer at an intermediary bank is not the originator's property, and not subject to attachment under Rule B. 198 F. Supp. 2d 385, 392. Winter Storm appealed, and the Panel reversed by opinion filed on November 6, 2002 (310 F.3d 263). On January 13, 2003, the Second Circuit denied TPI's request that the Opinion be reconsidered.

EFTs are an integral, indeed essential, part of international trade and commerce. They provide a secure, efficient, expeditious and low-cost means for contracting parties to pay for goods and services and settle their financial transactions. EFTs in the U.S. alone average almost $3 trillion per day.

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be common practice for a plaintiff in a maritime action to "paper" every major bank in the U.S. with writs of attachment in the hope that one or more will "capture" an EFT originated by the defendant.

Recognizing the importance of this payment system, every state in the country and the Board of Governors of the Federal Reserve System have sought to assure its benefits by adopting a regulatory scheme that frees intermediary banks—those banks that are part of the payment chain, but are not banks of the originator or beneficiary—from concerns over attachment of EFTs.

The Opinion awarded Winter Storm rights against BNY that TPI itself could never assert, a result justified on the misconception that maritime law pre-empts basic commercial law in this regard. But there is no pre-emption, because there is no federal law that contradicts state law. Nothing in federal law compels the result that a party may attach funds at an intermediary bank in an EFT to satisfy a claim against the originator of the EFT, even though the originator has no relationship with the intermediary bank and no claim on the funds held at the intermediary bank. The Clearing House believes that review—and reversal—of the Second Circuit's decision is vital for several reasons.

First, the Opinion threatens substantial disruption to international payments and international trade. The Second Circuit itself previously has recognized the considerable potential for disruption that the law of maritime attachment could have on international banking practice, *see Reibor*, 759 F.2d at 268, and the uncertainty that would be created by placing intermediary banks in the middle of civil disputes. *Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d 97, 102 (2d Cir. 1998) ("These are matters as to which an intermediary bank ordinarily should not have to be concerned and, if it were otherwise, would impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs."). Unless the decision is reversed, this very delay and increased cost would be the inevitable result, substantially curtailing the utility of funds transfers in both domestic and international transactions and, accordingly, causing a reduction in their use. Standard operating procedure for

every plaintiff in a maritime action would be to "paper" every major U.S. bank with writs of attachment in the hope that an EFT originated by the defendant would at that moment pass through one of those banks as intermediary. Such change—such regression—is unwarranted and unwelcome.

Second, the Opinion conflicts with applicable law, adopted in every state, that recognizes that a creditor (Winter Storm) of the originator (TPI) cannot attach EFT funds "because no property of the originator is being transferred," N.Y.U.C.C. § 4A-502, comment 4, and that prohibits an injunction or restraining order against an intermediary bank in the EFT process. N.Y.U.C.C. § 4A-503.[5]

The Opinion concludes that this consistent state law is pre-empted by the federal maritime law. It fails, however, to articulate any standard under which this Constitution-based pre-emption power is appropriately exercised. There is no explicit pre-emption, there is no occupation of the field of litigation, and there is no showing that the state law conflicts with any federal law. Instead, after stating that federal admiralty law regards a defendant's bank account to be property subject to Rule B attachment (27a), the Opinion then maintains, without any precedent, support or logic, that it was "TPI's funds [that were] in BNY's hands prior to their electronic transfer to RBS" and that they were the same as "funds held by BNY for the account of TPI" (27a).[6] This assertion is contrary to New York law (and the law of every

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[5] U.C.C. § 4-A-503 also has been adopted by the Board of Governors of the Federal Reserve System for its Fedwire system, *see* Federal Reserve System Regulation J, 12 C.F.R. Part 210. The Second Circuit thus has created a different federal rule for maritime attachments of EFTs on CHIPS or SWIFT, another major bank EFT system.

[6] Although the Opinion referred continually to "TPI's funds" (6a, 21a, 23a, n.7, 27a, 32a) "in Bank of New York's hands" (27a), repetition does not make it so. TPI had no claim against BNY, and BNY owed nothing to TPI.

other state), which says TPI had no property interest at BNY, and contrary to the circumstances found in every decision the Opinion cites, because here there were no bank accounts, no financial obligations, no goods or chattels, no bunkers or stores of the defendant to be attached. The Opinion simply deemed that "TPI's funds" were at BNY, and bootstrapped that erroneous finding into a jurisdictional basis for sustaining the attachment.[7]

Third, the Opinion conflicts with Supreme Court precedent. The Second Circuit disregarded this Court's holding in *Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995), when it stated as its fundamental premise that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment . . . ." (Opinion at 27a.) In *Strumpf*, this Court determined expressly that bank accounts are *not* the property of a depositor for purposes of the automatic stay provision of the bankruptcy code, but are merely promises to pay a depositor upon demand. Further, in contrast to a bank's promise to an accountholder, an intermediary bank in an EFT makes no promise to the EFT's originator, such as defendant TPI. Debits and credits posted by an intermediary bank that has no business relationship with a defendant in a maritime action are not property of that defendant subject to maritime attachment.

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[7] The Opinion's interpretation would mean that a Rule B attachment violates the Rules Enabling Act, 28 U.S.C. § 2072. The Rules Enabling Act, pursuant to which the Admiralty Rules are incorporated into the Federal Rules of Civil Procedure, contains a jurisdictional limitation requiring that any such rule "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072(b). Because under the substantive law of New York the originator of an EFT has no interest in the transferred funds and the attachment of an EFT at an intermediary bank is expressly prohibited, the Second Circuit's reading of Rule B creates from whole cloth a substantive right, and is therefore prohibited by the Rules Enabling Act.

Fourth, the Opinion conflicts with the law of another circuit. Although the Second Circuit now has decreed that debits and credits, in which the defendant has no present or prospective rights, posted by an intermediary bank are subject to a Rule B attachment, the Sixth Circuit has held that the defendant must have a present interest in property at a bank at the time of attachment for that attachment to be valid. In *Union Planters Nat'l Bank* v. *World Energy Systems Assocs.*, 816 F.2d 1092 (6th Cir. 1987), the court affirmed the district court's decision to quash a Rule B attachment where the subject bank was "merely a conduit through which the transaction would pass." *Id.* at 1097. The expectation there that defendant later would have an interest was insufficient, as here the defendant's completed role as originator of the EFT is insufficient under applicable law to present any attachable interest at the intermediary bank. While the defendant in *Union Planters* had an expectation that it would receive payment under a letter of credit, here TPI had no such expectation. If TPI appeared at BNY, it could expect nothing; it likely was not even aware that BNY was serving as an intermediary bank.

Finally, the Opinion attempts to justify its outcome on the basis of a case concerning a federal statute authorizing seizure of drug sale *proceeds* from an intermediary bank. *See United States* v. *Daccarett*, 6 F.3d 37 (2d Cir. 1993). *Daccarett*, however, actually refutes the Opinion because it confirms that no property interest existed in TPI. Although the Opinion finds "significant guidance" in *Daccarett* (27a), that decision in fact rejected the claimants' assertion that they had property interests in the credits posted by the intermediary banks, and authorized the seizure of proceeds only under a specific federal statute, 21 U.S.C. § 881(b), that covered proceeds. That carefully limited ruling should not be bootstrapped into a general application to attachments in maritime disputes that puts at risk the otherwise uniform treatment of intermediary banks under state and federal law.

Cf. Reibor, 759 F.2d at 267 (noting courts' longstanding goal, when interpreting admiralty law, "to minimize disruptive divergences between state and federal law.").

For each of these reasons, the Clearing House respectfully requests that the Petition be granted.

ARGUMENT

Admiralty Rule B provides that "[i]f a defendant is not found within the district, a verified complaint may contain a prayer for process to attach the *defendant's tangible or intangible property* . . . . in the hands of the garnishees named in the process." Rule B(1)(a) of the Admiralty Rules (emphasis added). It is undisputed that TPI "is not found within the district," and under applicable state law, uncontradicted by any federal law, the funds attached by Winter Storm at BNY, as an EFT intermediary bank, do not constitute TPI's "tangible or intangible property," attachable pursuant to Rule B.

In finding to the contrary, the Opinion ignored nearly every reference point the Second Circuit was provided.

I. The Opinion Conflicts With Applicable State Law.

The Opinion contradicts relevant state statutory law, and it purports to preempt that law on the basis that Rule B determines that credits on the books of an intermediary bank in an EFT constitute a defendant's funds that may be attached, regardless of state law establishing that the intermediary bank holds no property of the defendant, and consequently prohibiting such attachment. A fundamental flaw in the Opinion is that property interests are created under state law, *Butner* v. *United States*, 440 U.S. 48, 55 (1979), state law decrees that the defendant has no property interest in the credits posted at the intermediary bank, and no federal law contradicts that.

Although it is true that federal law generally governs questions concerning the validity of Rule B attachments, *see Maryland Tuna Corp.* v. *The MS Benares*, 429 F. 2d 307, 321 (2d Cir. 1970), courts have consistently referred to state law where "the precedent in federal admiralty law is . . . thin," as it is here. *Reibor*, 759 F.2d at 266. *See also Det Bergenske Dampskibsselskab* v. *Sabre Shipping Corp.*, 341 F.2d 50, 53 (2nd Cir. 1965) (relying on New York law where "there is no established admiralty doctrine . . . such as would reflect a predominant federal interest"). Reference to state law is particularly appropriate here because, as the Second Circuit previously noted, "a decision contrary to the general rule of the state might have disruptive consequences for the state banking system." *Reibor*, 759 F.2d at 266. ("New York being the site for multiple transactions in world commerce, the New York banking system is particularly vulnerable to such disruption.") (*Id.*) (citation omitted).

Article 4A of the U.C.C. governs wire transfers of funds in New York and the 51 other jurisdictions where it has been adopted. With respect to attaching an "originator's" (here TPI's) funds, the Article provides that a court may only restrain (1) a person from issuing a payment order to initiate a funds transfer; (2) an originator's bank from executing the payment order of the originator; or (3) the beneficiary's bank from releasing the funds to the beneficiary. *See* N.Y.U.C.C. § 4-A-503 ("Section 503"). A creditor cannot reach the amount of a funds transfer at any other point—including an EFT at an intermediary bank—because "no property of the originator is being transferred." *See* Official Comment 4, N.Y.U.C.C. § 4-A-502.

As applicable here, Section 503 means that there are only two places at which a funds transfer credit is attachable property under Rule B: first, the originator's bank, and only then if attachment occurs before the originator's bank has executed the originator's payment order; and second, the

beneficiary's bank, and only then if attachment occurs before the funds are released or paid to the beneficiary. "In particular, intermediary banks are protected," *see* Official Comment, N.Y.U.C.C. § 4-A-503, as the Opinion concedes. *See* Opinion at 32a.

Rule B undeniably authorizes attachment of a defendant's "property," but it does not purport to determine what property is. That definition is appropriately left to the states. *Butner* v. *United States*, *supra*, 440 U.S. at 55. And the states' unanimous conclusion that there is no property right of an originator at an intermediary bank is strongly supported by common sense. It is beyond dispute that TPI could not have gone to BNY and demanded that it be paid the amount of the EFT from BA, or the amount due to RBS. Indeed, TPI had no rights or claim whatsoever against BNY. How then can plaintiff have a right greater than defendant itself did?

In addition to having been adopted by fifty-two jurisdictions, Article 4A of the U.C.C., including Sections 502 and 503, has been adopted by the Board of Governors of the Federal Reserve System by regulation, and thus is federal law. *See* Federal Reserve System Regulation J, 12 C.F.R. Part 210. *See also* 32 I.L.M. 587 (1993) (reproducing United Nations Commission on International Trade Law's model law on cross-border credit transfers closely resembling Article 4A). Although the Federal Reserve's adoption of Article 4A expressly applies only to funds transfers through the Federal Reserve Banks' Fedwire system, the official comment accompanying the issuance of Part 210 makes clear that one of the primary goals of the regulation adopting Article 4A was uniformity in the law applicable to all funds transfers. *See* 55 Fed. Reg. 40792 (Oct. 5, 1990). *Cf. Grain Traders, Inc.* v. *Citibank, N.A.*, 160 F.3d at 102 ("One of Article 4-A's primary goals is to promote certainty and finality so that 'the various parties to the funds transfer [will] be able to predict risk with certainty, to insure against risk, to adjust operational

and security procedures, and to adjust price transfer services appropriately.'"). The Opinion's disregard of Regulation J, which it never mentions, would create precisely the inconsistent treatment of materially identical wire transfers that the Federal Reserve Board sought to avoid in adopting Regulation J.

II. The Opinion Violates The Rules Enabling Act, 28 U.S.C. § 2072.

Admiralty Rule B is a rule of procedure, intended to set forth the process to be followed in maritime attachments. It is now part of the Federal Rules of Civil Procedure, adopted under the authority of the Rules Enabling Act, 28 U.S.C. § 2072, and, like all federal rules, is recommended by the Advisory Committee on Civil Rules and adopted in accordance with the conventions and limitations of the Rules Enabling Act. Those conventions and limitations were violated here.

As a procedural rule, Rule B is subject to the Rules Enabling Act's jurisdictional limitation requiring that the Rules "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b); *cf. Semtek Intl. Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 503-4 (2001) (acknowledging violation of the Rules Enabling Act if Federal Rule of Civil Procedure 41(b) extinguished a right provided for under California law); *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 842 (1999) (adopting a "limiting construction" of Federal Rule of Civil Procedure 23(b)(1)(B) in order to "minimiz[e] potential conflict with the Rules Enabling Act, and [to] avoi[d] serious constitutional concerns"). Rule B is not unique in this regard; each of the Federal Rules of Civil Procedure is subject to this limitation. *Cf. Fontenot* v. *Roach*, 120 F. Supp. 788 (E.D. Tenn. 1954) (holding that the federal rules govern procedure only and not the substantive rights of persons who invoke the jurisdiction of the federal courts).

Accordingly, a court must not apply a federal rule if its application would interfere with a party's substantive rights, because such application would violate the Rules Enabling Act. *See, e.g., Douglas* v. *NCNB Texas Nat'l Bank*, 979 F.2d 1128 (5th Cir. 1992). As applicable here, the Rules Enabling Act prohibits a court from applying Rule B or permitting maritime attachment pursuant to it if such attachment would "abridge, enlarge or modify" a substantive right under state law.

In the ruling below, rights were not merely abridged or modified by a federal rule of procedure; rather Rule B was interpreted both to create rights out of whole cloth for the benefit of plaintiff and to revolutionize the rights and obligations of intermediary banks. Under comment 4 to N.Y.U.C.C. § 4-A-502, the originator of an EFT has no interest in the funds transferred,[8] and N.Y.U.C.C. § 4-A-503 permits attachment of a funds transfer credit only at the originator's bank or at the beneficiary's bank; it prohibits attachment at an intermediary bank. *See* Official Comment, N.Y.U.C.C. § 4-A-503 ("In particular, intermediary banks are protected."). In permitting a maritime attachment at an intermediary bank—which is plainly neither an originating nor a beneficiary bank—on the basis that "TPI's funds" were at BNY, the Second Circuit has created a property interest in TPI, where the substantive law of the state says there is not one. The Opinion then used this creation of rights to justify interference with the rights of an intermediary bank in an EFT, which is also prohibited under applicable law. The Opinion's interpretation of Rule B is impermissible under the Rules Enabling Act.

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[8] *See* Prefatory Note to U.C.C. Art. 4A (1989), 2B U.L.A. Pt. II, 9 (2002) ("no property right of [the originator] is actually transferred . . . .").

III. The Opinion Conflicts With Supreme Court Precedent.

The Second Circuit's Opinion is fundamentally flawed because its underlying premise is factually incorrect and has been rejected by this Court. Contrary to the Opinion's assertion that "[t]here is no question that federal admiralty law regards a defendant's bank account as property subject to maritime attachment" (Opinion at 27a), and putting to one side the fact that here the defendant had no bank account at BNY, the Supreme Court has determined that bank accounts are *not* the property of a depositor, but are merely promises to pay a depositor upon demand. *See Citizens Bank of Maryland* v. *Strumpf*, 516 U.S. 16 (1995).

In *Strumpf*, in the analogous context of determining the meaning of "property" under the automatic stay provisions of the bankruptcy code, 11 U.S.C. §§ 362(a)(3) and (a)(6), the Supreme Court examined the "false premise" that a bank's administrative hold on a deposit account was an "exercise [of] dominion over property that belonged to the respondent." 516 U.S. at 21. In concluding that a bank account was *not* "money belonging to the depositor and held by the bank," the Court noted that an account "consists of nothing more or less than a promise to pay, from the bank to the depositor." *Id.* *See also United States* v. *Butterworth-Judson Corp.*, 267 U.S. 387, 394 (1925) (holding that money deposited in a bank account is the bank's property, the deposit creating a debt owed by the bank to the depositor). Accordingly, the Supreme Court held that the bank's refusal to turn over the contents of an account to a bankruptcy estate "was neither a taking of possession of respondent's property nor an exercising of control over it, but merely a refusal to perform its promise." 516 U.S. at 21.

If the Second Circuit had accepted that funds on deposit at a bank are not property of an accountholder but only a promise to pay, it would have been even clearer that debits

and credits posted by an intermediary bank that has no relationship with a defendant in a maritime action cannot be property of that defendant. The intermediary bank makes no promise, explicit or implicit, to pay the originator. And even if a bank's promise to pay a defendant can be attached under Rule B, a promise to perform by BNY made not to the defendant but to an originator's bank in Thailand or a beneficiary's bank in London is not defendant's "property"—*i.e.*, not a "seizable res"—within the meaning of Rule B.

That result should have been obvious here because BNY held no property of TPI, had made no promise to TPI and owed no obligation to TPI. It makes no difference that BNY segregated an amount of funds some days after the multiple maritime attachments began, because that act does not create additional rights in any party. *See Daccarett*, 6 F.3d at 51-52 (freezing of funds does not afford customer status to claimants).

IV. The Opinion Conflicts With The Law Of The Sixth Circuit.

The Opinion also conflicts with the law of another circuit.

The Second Circuit determined that the funds attached by Winter Storm at BNY, as an EFT intermediary bank, somehow constituted TPI's "tangible or intangible property" attachable pursuant to Rule B, even though TPI had no interest in those funds at the time of attachment. The Opinion's apparent premise is that because the defendant originated the EFT, that former interest in funds at the originating bank is a sufficient property interest to justify attachment of the EFT at an intermediary bank. The Sixth Circuit disagrees. In *Union Planters Nat'l Bank* v. *World Energy Systems Assocs.*, 816 F.2d 1092 (6th Cir. 1987), even where an anticipated payment under a letter of credit was to be made to the defendant, the Sixth Circuit affirmed the district court's decision to quash a Rule B attachment where

the subject bank was "merely a conduit through which the transaction would pass." *Id.* at 1097. It found that expectations that defendant would later benefit from property passing through an intermediary bank are not subject to attachment under Admiralty Rule B.

In *Union Planters*, the defendant (WESA), a coal distributor, was the beneficiary of a letter of credit issued by a coal purchaser's Taiwanese bank. Pursuant to the letter, WESA's bank (Union Planters) would credit funds to WESA's account as soon as WESA presented certain documents reflecting that the shipment of coal had been made in accordance with the plaintiff's and defendant's underlying contract. One of the defendant's judgment creditors served a writ of attachment on Union Planters, seeking to attach all of WESA's assets under its control. The bank responded to the writ by stating that, at the time the writ was served, it had no attachable assets belonging to the defendant. The district court agreed, and rejected the creditor's argument that there were funds available under the letter of credit that belonged to WESA because WESA had shipped the coal in accordance with the underlying contract.

On appeal, the Sixth Circuit affirmed. The court stressed that however certain WESA's eventual entitlement to the funds, the funds could not be deemed its property until the appropriate confirmatory documents were tendered to Union Planters. *Id.* at 1097-98. The court noted that "the federal writ of maritime attachment is the equivalent of one cast of the net; if the fish are not running as of the date of service, the net is returned empty to court." Id at 1098. *See also Ocean Focus Ltd.* v. *Naviera Humboldt*, 962 F. Supp. 1481 (S.D. Fla. 1996) (granting motion to quash writ of attachment of line of credit).

The circumstances here present even less support for an attachment. Winter Storm "cast its net" over BNY, but BNY held no funds payable to TPI. The last act of TPI, as

originator, was to order BA, its Thai bank, to cause RBS to pay RBS' customer. At no time did BNY have any obligation to pay TPI, and TPI never had any claim against BNY. Under the Sixth Circuit's opinion in *Union Planters* then, the funds here were not properly attached.

V. The Opinion Is Ill-Founded.

The Opinion is misguided and, if permitted to stand, presents a dangerous precedent. In lieu of applying on-point federal and state authority, and thereby avoiding a direct conflict with state law, the Opinion concluded instead that federal law has "fashion[ed] a rule in this Circuit that EFT funds in the hands of an intermediary bank may be attached pursuant to Admiralty Rule B(1)(a)" (Opinion at 32a). There is, however, no such federal rule regarding Rule B. The Opinion instead relies by attempted analogy on a single materially distinct case, *United States* v. *Daccarett*, *supra*. The Opinion extracted *Daccarett*'s limited holding regarding EFTs in the context of the federal war on drugs—one "that only obliquely graze[s] the issue before us," *Reibor*, 759 F.2d at 265—and applied it here to create a sweeping and overbroad rule. *Daccarett* does not support the Opinion's reading.

In *Daccarett*, associates of a Colombian drug cartel, recently arrested, sought to move funds located in certain European banks to Colombia before they could be confiscated. Accordingly, they originated a series of EFTs, some of which used New York banks as intermediaries. The United States government seized some $12 million of these funds pursuant to the Drug Abuse Prevention & Control Act, 21 U.S.C. § 881(b) ("Drug Control Act"), including by serving Admiralty Rule C warrants on New York-based intermediaries. The Colombian beneficiaries of the EFTs contested the seizures.

Among the arguments advanced by the beneficiaries in *Daccarett* was that "EFTs are not seizable properties for

purposes of the civil forfeiture statutes because they are merely electronic communications." *Id.* at 54. The *Daccarett* court rejected this argument, holding that "an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res *under the forfeiture statutes*." *Id.* at 55 (emphasis added).

Daccarett's holding is quite narrow; the court held that proceeds of illegal drug transactions on deposit can be subject to forfeiture *under the Drug Control Act*. The Drug Control Act permits the Justice Department to effect the forfeiture of "moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] *all funds traceable to such an exchange*." 21 U.S.C. § 881(a)(6). Accordingly, the *Daccarett* court did not hold that funds on deposit at an intermediary bank were the *property* of any parties subject to arrest,[9] but only that EFT credits are subject to arrest as proceeds "traceable to" illegal drug transactions. The Admiralty Rules contain no analogue to the Drug Control Act's provision for "traceable funds." *Daccarett* thus sheds no light on the critical question here of whether the EFT funds residing in the intermediary bank constitute defendant's property.

The *Daccarett* court contemplated a seizure in connection with a criminal action and, more generally, as part of a larger federal plan designed expressly to provide an economic incentive for policing agencies to seize and forfeit property believed to have a connection to illegal drugs. That federal plan, as embodied in the Drug Control Act, extends beyond

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[9] To the contrary, the court rejected the claimants' Fourth Amendment objections to seizure of financial records at the banks on the basis that claimants had no protectable interest in the records because they were not customers of the intermediary banks. 6 F.3d at 50.

civil statutes and permits not only the seizure of property but funds traceable to that property. *See generally* Marc B. Stahl, "Asset Forfeiture, Burdens of Proof and the War on Drugs," 83 Journal of Criminal Law and Criminology 274 (1992). The Clearing House does not advocate limiting the United States government's ability to police or protect its citizenry from the impact of illegal drugs, and acknowledges that liberal seizure standards may aid in that effort. However, the same incentives and policy motivations do not exist in conventional civil contract disputes such as this, and the Opinion's broad application of seizure under the Drug Control Act is therefore not warranted.

VI. The Opinion Is Bad Policy And Threatens Substantial Disruption To Banking Practice.

Funds transfers have become an integral component of business transactions, as they facilitate the efficient, high-speed and low-cost transfers of funds. *See* 84 Fed. Res. Bull. 25, Statement by Edward W. Kelley, Jr., Member, Board of Governors of the Federal Reserve System, Before the Committee on Banking and Financial Services, U.S. House of Representatives, Nov. 4 1997 ("The current average total daily value of Fedwire funds transfers is approximately $1.1 trillion."); *Banque Worms* v. *BankAmerica Int'l*, 77 N.Y.2d 362 (1991) (noting that transfer volumes reach $1 trillion daily). Present daily volumes average close to $3 trillion.[10]

Permitting maritime attachments of intermediaries in EFT transactions would inhibit the free flow of funds among financial institutions, creating uncertainty as to rights and liabilities and exposing intermediaries to the continuous risk of litigation from originators, beneficiaries, sending banks, receiving banks and claimants against all of them. It could

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[10] *See* www.federalreserve.gov/PaymentSystems/FedWire/annual.pdf (FedWire); www.nacha.org/news/pressreleases/2003/PR042803/pr042803.htm (automated clearing houses); www.chips.org/stats.htm (CHIPS).

require intermediaries to more closely coordinate their legal and business departments on a second by second basis, all of which would ultimately impede the use of rapid electronic funds transfers in commerce by causing delays and driving up costs.

Further, as the District Court recognized, 198 F. Supp. 2d at 391, n. 7, upholding the attachment here effectively will create a rule that "every time a foreign maritime entity initiates a wire transfer abroad, it must foresee attachment in New York and suit in the United States." Thus, the principle urged by the Opinion will have a substantial adverse effect on a bank's ability to participate in the funds transfer payment system and the ability of businesses to transfer funds efficiently, and may serve to chill the use of intermediary banks in the United States, particularly in the Second Circuit.

CONCLUSION

For each of the above reasons, the Petition should be granted.

Respectfully submitted,

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